APPENDIX A.

U.S.C., Title 9,

Section 2:

"A written provision in any • • • contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract • • • shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 3:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing that applicant for the stay is not in default in proceeding with such arbitration."

Section 14:

"This title shall not apply to contracts made prior to January 1, 1926."

U.S.C., Title 28, Federal Rules of Civil Procedure,

"Rule 26. Depositions Pending Action • • •

"(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party

who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

"(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

"(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

"(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

"Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same

subject matter is afterward brought between the same parties, or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

"(c) Objections to Admissibility. Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. • • •

"Rule 33. Interrogatories to Parties • • •

"Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule."

APPENDIX B.

The Trial Court's Memorandum:

This case is submitted on plaintiff's motion for summary judgment, plaintiff's objections to defendant's request for admissions, and on plaintiff's motion to amend its complaint.

Since the parties agree that the statement of facts contained in the plaintiff's brief is substantially correct, there is no need to repeat the facts here.

The plaintiff contends that since a train of the defendant was involved in a collision with the Godbey automobile the defendant is liable for all losses sustained regardless of any negligence of the plaintiff that may have been the sole or contributing cause of the accident. It relies on the construction given the 1895 contract by the Kentucky Court of Appeals in *Louisville & N. R. Company* v. *Chesapeake & O. Ry. Company*, 107 Ky. 191, 53 S. W. 277, and a contemporaneous construction of the contract reflected by the 1948-49 correspondence between the parties.

The opinion in *Louisville & N. R. Company* v. *Chesapeake & O. Ry. Company, supra*, dealt with an accident that occurred when an employee of the plaintiff was killed while engaged in maintaining the jointly used track of the two railroads. No train of either party was connected with the accident. The plaintiff, having paid the loss resulting from this accident, brought suit against the defendant on the grounds that the loss was attributable to the cost of maintenance of the road and should be borne proportionately by both railroads as any other maintenance expense in accordance with Section Seventh of their contract, and the Court of Appeals so held.

Interpretation of the contract was called for because there was no clear provision establishing liability for dam-

ages resulting from the negligence of road maintenance employees unless sustained in connection with a train or property of one of the parties. The pertinent provision of the contract requiring clarification was the first literary paragraph of Section Fourth which provides that maintenance employees ". . . shall, in respect of the liability of the parties using said line, to each other or to third persons, growing out of the fault or neglect of such servants or employes, be deemed and held to be the sole servants of the party to or upon or in connection with whose train or property any loss or damage may have occurred." The court concluded that the words "train or property" referred to trains and property belonging exclusively to and in the exclusive use of one or the other party while using the line. In holding that the employee who was killed while engaged in the maintenance of the road was a joint employee of both parties and that the loss was chargeable to the cost of maintenance although no train of either party was connected with the accident, the court said:

> ". . . If a crew in charge of a hand car, whilst engaged in repairing the road, and therefore in the joint service of both parties, negligently cause damages and loss in connection with a train of the first party, the loss is that of the first party; but, if in connection with a train of the second party, the loss is that of the second party. But if the crew, the joint servants of both, whilst engaged in the maintenance and repair, derail the hand car, and cause loss or damage to person or property, the loss is chargeable to the cost of maintenance."

The present case does not involve the question of liability between the parties for damages caused by the negligence of joint employees where no train of either party is involved. It is concerned with the question of liability

between the parties when one party sustains a loss in an accident in which its train is involved and the accident is caused not by its own negligence or the negligence of joint employees but by the negligence of the employees or property of the other party and over which the other party exercises exclusive control. Therefore the opinion in *Louisville & N. R. Company* v. *Chesapeake & O. Ry. Company* is helpful only as it may serve to show the intention of the parties as related to the issue to be decided here.

The contemporaneous construction of the 1895 contract reflected by the 1948-49 correspondence between the parties concerned a factual situation where a small girl was injured on a crossing gate when raised after a train of the defendant had passed. The train crew was not negligent and there was no negligence on the part of the employee operating the gate, since he was situated where he could not see it. Liability was based solely on the negligent design or location of the gate. Under these facts a train was connected with an accident which could not be attributed to the negligence of the train crew or to a joint employee but was attributable solely to the negligent design or installation of equipment in the common service of both railroads. The correspondence did little more than specifically define, approve and apply the language contained in *Louisville & N. R. Company* v. *Chesapeake & O. Ry. Company*, *supra*, page 197.

> "The only property not sold or let to the joint use and occupancy of the second parties under the scheme of this contract was that at the terminals of the line and the trains and cars in the exclusive use of the first party in the operation of its trains; and the only agents and servants exclusively the agents and servants of either party to the contract were those engaged in the operation of the trains and cars belonging distinctly to the one or the other party. Practically everything

connected with the line, from one end of it to the other, was regarded as held, owned, and managed in common, except the trains and property of either party used in running and operating the road."

It follows that the defective crossing gate which was the subject of the 1948-49 correspondence was regarded by the parties under their contract as jointly "owned," and although the operator was not negligent, since the gate was in common use, the damage it caused was chargeable to the party the movement of whose train occasioned its use. This contemporaneous construction of the contract provided an "easily applied test" to determine liability between the parties when a train was connected with an accident that was caused not by the negligence of the train crew or joint employees but by defective property jointly owned and in common use on the road.

These two factual situations that have been discussed are clearly distinguishable from the facts of the present case. Here the plaintiff had parked gondola cars on a siding that obstructed the view of the crossing where the train struck the Godbey automobile and plaintiff's negligence is alleged to be the sole cause of the accident. Therefore the damage arose from an accident allegedly caused from property not jointly "owned" and in common use but property exclusively owned and controlled by the plaintiff. Nor was the damage caused by employees in joint service, as the employees involved were in the exclusive service of the plaintiff.

Literary paragraphs 3, 4 and 5 of Section Fourth of the contract provided that when damage is caused by the negligence of either party or their officers or servants, the party whose negligence caused the damage shall pay it, and if the damage should result from their joint negligence, then it is to be equally borne. These provisions of the contract are controlling of the issue to be resolved in this case.

It his previously been decided that literary paragraph 6 of Section Fourth, providing for arbitration where the parties cannot agree as to who is at fault, cannot be invoked because the Federal Arbitration Act does not apply to contracts made prior to January 1, 1926, Title 9, U.S.C.A., Section 14, nor under KRS 417.010 for failure to name arbitrators. *Gatliff Coal Company* v. *Cox,* 142 F. 2d 876, 881 (C.A. 6); Court order dated July 16, 1958.

Therefore, this case will be placed on the trial docket, and plaintiff's motion for summary judgment, plaintiff's objections to defendant's request for admissions, and plaintiff's motion to amend its complaint will be overruled by an order this day entered.

Henry L. Brooks,
United States District Judge.

August 7, 1959.

The Opinion of the Court of Appeals:

No. 14408

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - *Plaintiff-Appellee,*

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, - - - - - *Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE.

Decided October 27, 1961.

Before: MARTIN and CECIL, Circuit Judges, and DARR, Senior District Judge.

PER CURIAM. This appeal involves a collision between an automobile and a passenger train of the Chesapeake and Ohio Railway Company, at a crossing known as the Avoca Crossing, at the intersection of Avoca Road and Aiken Road, in Jefferson County, Kentucky.

The point of collision was in the country outside of any municipal corporation and was on a main line of the Louisville and Nashville Railroad Company between Louisville and Lexington, Kentucky. At the place where the accident occurred, the main line tracks and a siding adjacent thereto were owned and maintained by the Louisville and Nashville Railroad Company. Further reference to these railroads will be by their commonly abbreviated names, C. and O. and L. and N.

The C. and O. operated its trains over the tracks of the L. and N. by virtue of a contract entered into between the parties in 1895. There were mutual covenants in this contract that each party, respectively, would be responsible for damages caused by its own fault or negligence.

The driver of the automobile was seriously injured and her damages were paid jointly by the two railroad companies, without prejudice to the right of either to recover from the other the amount expended in making the settlement. By payment to the driver, contributory negligence on her part was waived and the issue to be determined was whose negligence caused the collision.

Briefly stated, the facts concerning the accident are as follows: The railroad tracks run in a general east and west direction and Aiken Road crosses the tracks at grade, running generally north and south. On September 17, 1955, the day before the accident, the L. and N. placed twenty gondola cars on the west end of the siding. The placing of these cars caused the easternmost car of a string of cars already on this siding to be moved so that its eastern end was only twenty-four feet from the west side of Aiken Road. It is claimed by C. and O. that this was in violation of the rule of the L. and N. that there should be at least fifty feet clearance from the highway and was the cause of the accident. At the time of the accident, Mrs. Godbey, the driver of the automobile, was crossing the tracks from north to south. The proof tended to show, that with this car in this position, the closest place of safety at which she could have stopped, she could not have seen the eastbound C. and O. train which struck her until it was within ninety-four feet of the highway. At the same time and with the automobile at the same place, the engine crew could not have seen the hood of the automobile until the train was within three hundred feet of the crossing. Without this car on the siding, as it was, there was a clear view of an approaching train for approximately thirteen hundred feet.

Each company charged the other with negligence and they could not agree between themselves on a settlement of the dispute as to whose negligence caused the collision. The C. and O. wanted to arbitrate in accordance with a provision of the 1895 contract. The L. and N. declined arbitration and brought suit in the District Court for the Western District of Kentucky to recover its portion of the damages paid to Mrs. Godbey.

The case was tried to a jury on three issues: was the accident caused by the negligence of the C. and O. by the negligence of the L. and N., or by their joint negligence? The jury found against the C. and O. on these issues and judgment was entered for the L. and N.

The questions presented were pure questions of fact and there was substantial evidence to warrant submitting the issues to the jury. The jury having made its findings on the facts, we cannot say that they are contrary to the evidence. The instructions to the jury were adequate and accurate. Proximate cause was properly defined and whether the accident was caused by the placing of the L. and N. gondola car on the siding, as it was, or by the operation of the C. and O. train, were questions upon which reasonable minds might differ.

It is our opinion, after viewing the film which was rejected in evidence by the trial judge, that it would not have been helpful to the jury. He committed no error in respect to the admission of evidence.

An examination of the law and the evidence concerning arbitration leads us to the conclusion that the trial judge correctly decided this issue presented by the C. and O.

The judgment of the District Court should be and it is accordingly affirmed.

The Judgment of the Court of Appeals:

JUDGMENT.
October 27, 1961

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(s) Lester L. Cecil,
United States Circuit Judge.